89-827

NUMBER _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

LAWRENCE ALLEN CAMERON,

Petitioner

vs.

ROBERT GOLDSMITH

and

ROBERT K. CORBIN,

Attorney General of Arizona

Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS FOR

THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Was the hearing held on remand from the Arizona Court of Appeals, to determine if petitioner had been competent to waive his right to a jury trial, constitutionally valid and was it the full and fair hearing required under 28 U.S.C. Section 2254(d)?

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CASES

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OPINIONS BELOW

The only published opinion involving this case was the first decision of the Arizona Court of Appeals, State v. Cameron, 146 Ariz. 210, 704 P.2d 1355 (App. 1985). The decisions of all the other courts considering this case, both state and federal, have been by Order or Memorandum. All the decisional documents are included in the Appendix.

JURISDICTION

Petitioner filed a Petition for Writ of Habeas Corpus with the United States District Court of Arizona on March 25, 1988. It was denied without an evidentiary hearing on December 2, 1988. The District Court had jurisdiction pursuant to 28 U.S.C. Section 2254.

Notice of Appeal to the Ninth Circuit was timely filed December 14, 1988. On September 19, 1989, a Memorandum Decision was issued by that Court affirming the Order of the District Court. The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. Section 1291.

This Court has jurisdiction pursuant to 28

U.S.C. Section 1254(1) and Rule 17.1(a), Supreme Court Rules.

This Petition for Writ of Certiorari is timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the

State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. Section 2241.

(c) The writ of habeas corpus shall not extend to a prisoner unless --

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

28 U.S.C. Section 2254.

State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

* * *

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State

court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State's factual determination.

STATEMENT OF THE CASE

Petitioner was indicted for numerous offenses which allegedly occurred between July 24 and August 3, 1983: third degree burglary, kidnapping, attempted first degree burglary, resisting arrest, theft, criminal damage and four counts of aggravated assault.

Prior to trial in Pima County, Arizona, Superior Court, petitioner's attorney requested that he be examined by mental health professionals, pursuant to Rule 11, Arizona Rules of Criminal Procedure, to determine if he was competent to stand trial and if he had been insane at the time of the commission of the offenses.

On October 31, 1983, Pima County Superior Court Judge G. Thomas Meehan reviewed the reports prepared by the mental health professionals and found petitioner competent to stand trial. (CR 2, Exhibit 4, pp. 4-5) [1]

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1. CR ___ refers to the Clerk's Record in the District Court, now at the Ninth Circuit.

On December 6, 1983, petitioner waived his right to a jury trial on all counts in both indictments, after being questioned in court by Judge Meehan. (CR 2, Exhibit 5, pp. 16, 18-24) After hearing all the evidence, Judge Meehan found petitioner guilty on all charges. (CR 2, Exhibit 6) On January 19, 1984, Judge Meehan found aggravating circumstances and sentenced petitioner to three consecutive ten year sentences of imprisonment, all other sentences to run concurrently. (CR 2, Exhibit 7)

Petitioner appealed his convictions and sentences to the Arizona Court of Appeals, which held it was error for the trial court not to have made a specific on-the-record finding of his competency to waive his right to a jury trial. The Court of Appeals remanded to the trial court for a hearing to determine if the court had found petitioner competent to waive a jury trial, and if that could not be determined, if petitioner had been competent to waive a jury trial. State v. Cameron, 146 Ariz. 210, 704 P.2d 1355 (App. 1985) (Cameron I) (Appendix 1).

On October 18, 1985, Judge Meehan held a hearing. No witnesses testified, although petitioner had requested that he be examined by mental health professionals on the issue of his competency to waive a jury trial, since that had never previously been discussed. (CR 2, Exhibit 11) Judge Meehan suggested employing the determination made at the "Rule 11 proceeding" and the transcript of the pretrial proceeding in which petitioner had been informed of his right to a jury trial. (CR 2, Exhibit 12, p. 2; Appendix 5) Judge Meehan then said:

> "I don't know of any different standard other than the competence. I don't think he has to have a higher standard to waive a trial by jury than competent to stand trial." (CR 2, Exhibit 12, p. 2; Appendix 5)

Both counsel attempted to inform the court that the standards were in fact different. (CR 2, Exhibit 12, pp. 2-3; Appendix 5)

Judge Mehan then stated that from his recollection and review of the record and the medical reports, petitioner had appeared to

understand what he was doing and he had been competent to make an intelligent and voluntary waiver of his right to a jury trial. (CR 2, Exhibit 12, pp. 3-4; Appendix 5)

Petitioner then addressed Judge Meehan personally and stated that at the time of trial, he had been taken from Kino Hospital, [2] he was under "a lot of psychiatric medication" and "I don't recall being here and waiving my right to any trial." (CR 2, Exhibit 12, p. 4; Appendix 5) The prosecutor asked Judge Meehan if his findings were also based on the standards set forth in the Court of Appeals' opinion, and the judge stated "obviously". (CR 2, Exhibit 12, p. 5; Appendix 5)

After this hearing, petitioner again appealed his convictions and sentences. In a Memorandum Decision, the Court of Appeals affirmed Judge Meehan's actions and affirmed the convictions and sentences. State v. Cameron, Memorandum

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2. Pima County's community hospital, which has a psychiatric unit.

Decision, (Ariz.Ct.App., 6/11/86) (Cameron II) (Appendix 2)

Petitioner exhausted his state remedies by filing a Petition for Review with the Arizona Supreme Court, which was denied. He then filed a habeas corpus petition in federal District Court, which was also denied. (Appendix 3) Petitioner then appealed to the Ninth Circuit which affirmed the denial of habeas corpus, holding:

> "On these facts, we conclude that Cameron was afforded a constitutionally adequate determination of his competency to stand trial. The determination was fairly supported by the record." (Appendix 4)

It is this conclusion which petitioner desires this Court to review and reverse.

REASONS FOR GRANTING THE WRIT

Petitioner has yet to receive the full and fair hearing which is constitutionally required to determine if he was competent to waive his right to a jury trial. In holding that petitioner did receive a constitutionally

adequate determination of his competencey to waive his right to a jury trial and that the facts support that decision, the Ninth Circuit erroneously applied this Court's decision in Maggio v. Fulford, 462 U.S. 111, 103 S.Ct. 2261, 76 L.Ed.2d 794 (1983), reh.den. 463 U.S. 1236, 104 S.Ct. 29, 77 L.Ed.2d 1451 (1984) and its own decision in Evans v. Raines, 800 F.2d 884 (9th Cir. 1986).

The facts in Maggio v. Fulford are very different from the facts in this case. Fulford did not make his request for a hearing to determine his competency to stand trial until the day of trial and the record did not suggest that he had a history of mental or emotional difficulties. 462 U.S. at 112, 76 L.Ed.2d at 796.

Contrast that with petitioner's case: his request for a determination of his competency to stand trial was made very soon after he was charged and information was presented that he had a prior history of being diagnosed as paranoid schizophrenic, being hospitalized and receiving

medication for his schizophrenia, and experiencing hallucinations and delusions prior to trial. (CR 2, Exhibit 1) Further information was presented that petitioner had been a patient at Kino Community Hospital, Tucson, Arizona, in August, 1983, having been transferred from the jail, where he was disagnosed a chronic paranoid schizophrenic and obsessive/compulsive personality which decompensated under stress. (CR 2, Exhibit 2)

Additional information was that petitioner had a family history of psychiatric problems, that during his stay at the jail, he was agitated to the point of psychosis and he was delusional about receiving poisoned food. (CR 2, Exhibit 3)

Fulford was interviewed by one psychiatrist for approximately one hour the day before trial. 462 U.S. at 113, 76 L.Ed.2d at 797. Petitioner was interviewed by one psychologist and two psychiatrists, two to three months before trial. (CR 2, Exhibits 2, 3, and 4)

One of the major differences between Fulford's case and petitioner's case is that

Fulford had a pretrial hearing which specifically addressed the issue of whether there should be a competency hearing. The psychiatrist who had interviewed Fulford testified at that hearing and the Louisiana trial judge stated specific reasons for his refusal to hold the competency hearing, both contemporaneously and in later post conviction relief proceedings. 462 U.S. at 113-16, 76 L.Ed.2d at 797-99.

In petitioner's case, Judge Meehan reviewed the written reports of the mental health professionals when he decided petitioner was competent to stand trial (CR 2, Exhibit 4, pp. 4-5) and he heard their testimony during trial concerning whether petitioner had been insane at the time of the commission of the offenses. State v. Cameron, 146 Ariz. at 213. What he never heard was any testimony as to whether petitioner was competent to waive his constitutional right to a jury trial.

In Fulford, this Court stated:

> "Most importantly for our purposes, the trial judge concluded that respondent's surprise, 11th-hour

> motion for appointment of a competency commission 'was just a subterfuge on the part of this defendant to attempt to keep from going to trial so that he would be tried at a different time from the other defendants.'" 462 U.S. at 115, 76 L.Ed.2d at 798.

There was not the slightest evidence that petitioner's request for a competency determination was any sort of a subterfuge on his part. All the evidence presented was that he had a chronic history of mental health problems. The facts in Fulford which lead this Court to hold that he had received a full and fair hearing on whether he should have a competency hearing are not present in petitioner's case. If this Court allows the Ninth Circuit's decision to stand, then the Fulford decision is not only ignored but rendered meaningless. The message will be that procedure is everything and substance means nothing. As long as the trial court brings the defendant into court on a remand hearing, it does not have to consider any evidence he wants to present and a sham "competency hearing" is approved.

Evans v. Raines was also misapplied by the Ninth Circuit. It had originally remanded the case to the district court, with directions to send the case back to the state court for an evidentairy hearing, where testimony was presented on the question of whether Evans had been competent to waive counsel. The state court resolved the conflicting evidence against Evans and held that he had been competent to waive counsel. 800 F.2d at 886.

The district court upheld the state court on its review of the decision and determined that the findings were supported by the record and not clearly erroneous. 800 F.2d at 886. Evans then appealed that decision to the Ninth Circuit, which upheld the district court. One of the Ninth Circuit's considerations was that the state court had been able to assess the credibility of the witnesses that had testified at the hearing and that although there had been conflicting evidence, the state court had resolved the conflicts in the state's favor. Therefore, the state court's resolution was "'fairly supported

by the record.' 28 U.S.C. Sec. 2254(d)." 800 F.2d at 887.

In petitioner's case, there were no witnesses who testified at his "competency hearing" before Judge Meehan on October 18, 1985. (Appendix 5) In his ruling, the judge relied solely on his recollections of almost two years before and medical reports which never addressed the question he was called on to answer: whether petitioner had been competent to waive his constitutional right to a jury trial.

The holding in Evans v. Raines that when the state court's resolution of conflicting testimony is "fairly supported by the record", it will not be reversed on appeal, does not apply to petitioner's case because there was no hearing and no conflicting testimony to resolve because petitioner was denied his right to put on evidence. Again, the Ninth Circuit's decision in petitioner's case elevates procedure over substance.

The "competency hearing" Judge Meehan held after the case was remanded by the Arizona Court

of Appeals was not the full and fair hearing petitioner was entitled to, 28 U.S.C. Sec. 2254(d), and it is a miscarriage of justice that every court that has reviewed this case since that hearing has decided otherwise. Judge Meehan's refusal to have petitioner evaluated, when almost two years had elapsed since petitioner waived his right to a jury trial, the fact that the previous evaluations had never addressed the question of petitioner's competency to waive his constitutional rights, and the judge's and the courts' disregard of the only new evidence presented at that hearing were a denial of due process which only this Court can remedy.

CONCLUSION

Petitioner has not yet received the full and fair hearing he is entitled to to determine if he was competent to waive his constitutional right to a jury trial. It is a miscarriage of justice that no other court that has reviewed this case since the sham "competency hearing" has seen that. This Court must issue a Writ of Certiorari

to review the judgment and decision of the Ninth Circuit.

RESPECTFULLY SUBMITTED this 20th day of November, 1989.

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The STATE of Arizona, Appellee,

v.

Lawrence Allen CAMERON, Appellant.

Nos. 2 CA-CR 3446, 2 CA-CR 3447-2.

Court of Appeals of Arizona,
Division 2, Department A

May 1, 1985.

Review Denied Aug. 20, 1985.

OPINION

BIRDSALL, Presiding Judge.

Following a Rule 11 [1] examination to determine his competency, appellant was found competent to stand trial on four counts of aggravated assault, one count each of attempted burglary, burglary, kidnapping, theft, resisting arrest, and criminal damage. Appellant waived his right to a jury trial and raised an insanity defense. He was found guilty on all counts, two of the convictions were held to be priors to the

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1. Rule 11, Rules of Criminal Procedure, 17 A.R.S.

others, and he was sentenced to four ten-year terms, one eight-year term, three three-year terms, one 2.5-year term, and one 1.875-year term, all aggravated. Three of the ten-year terms were applied consecutively, the rest were all concurrent to one or another of the ten-year terms.

Appellant's issues on appeal are as follows: 1) the trial judge erred in not making a separate finding of his competency to waive his constitutional right to a jury trial; 2) the court erroneously admitted statements appellant made during his Rule 11 evaluation; 3) the trial judge erred in rejecting appellant's insanity defense because his insanity was established by clear and convincing evidence and the state failed to prove his sanity beyond a reasonable doubt; and 4) appellant's consecutive sentences are excessive under the circumstances.

Prior to trial, defense counsel moved for a mental examination to determine both appellant's competence to stand trial and his mental condition at the time of the incidents with which

he was charged. A psychologist, Dr. Hinton, filed a report concluding that appellant was competent to stand trial, but his ability to distinguish right and wrong and his appreciation of the nature and consequences of his acts were questionalble, and that a formal Rule 11 proceeding was needed. The court granted appellant's Rule 11 motion and appointed two psychiatrists. Both psychiatrists found appellant competent to stand trial, one later testified that in his opinion appellant was M'Naghten insane at the time of the incidents; the other testified that appellant was not M'Naghten insane. The psychologist also testified at trial that in his opinion appellant was M'Naghten insane.

Following the determination of appellant's competence to stand trial, the parties agreed to waive a jury trial, and at a hearing, following questioning of appellant by the trial judge, the judge approved of the waiver of the jury. The defense of insanity had been raised and much of the actual trial consisted of testimony as to

appellant's sanity at the time of the incidents. In addition to the testimony of the two psychiatrists and the psychologist, other testimony concerned a diagnosis of paranoid schizophrenia made at Kino Hospital upon admission following an episode of psychotic behavior in the Pima County Jail while appellant was awaiting trial. The court also learned that appellant's parent suffered from a severe mental illness, and that appellant had undergone previous psychiatric hospitalization in New York.

Appellant now argues that it was not sufficient that the trial judge make a finding that appellant's waiver of the jury trial was made knowingly, it was also necessary that the judge make a competency determination of his ability to waive a constitutional right. We have analyzed a succession of cases dealing with the law in Arizona concerning competency to waive jury trial and we conclude that appellant is correct, it was error not to make a specific on-the-record finding of his competency to waive the jury trial.

Our examination begins with Westbrook v. Arizona, 384 U.S. 150, 86 S.Ct. 1320, 16 L.Ed.2d 429 (1966). There the Supreme Court found a distinction between a defendant's mental competence to stand trial, and competence to waive his right to counsel at trial. In light of its decision in the same term in Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), the Court, in a per curiam decision, remanded Westbrook to the Arizona Supreme Court for further proceedings. Pate concerned the failure of a court to determine competency of a defendant to stand trial.

The Ninth Circuit Court of Appeals cited Westbrook in its decision in Sieling v. Eyman, 478 F.2d 211 (9th Cir. 1973). Sieling concerned a situation similar to the one we consider today. Three mental health experts found the defendant M'Naghten insane at the time of the crime, yet two believed defendant was competent to stand trial. Before his trial began, Sieling entered a plea of guilty, no additional determination of his competency to enter the plea

was made, and he was sentenced. The denial of his petition for habeas corpus by the United States District Court was appealed to the Ninth Circuit.

Quoting Johnson v. Zerbst, 304 U.S. 458, 465, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938), the court stated: "[i]t is of course well settled that a defendant in a criminal trial cannot be deemed to abandon any fundamental constitutional protection unless there is both 'an intelligent and competent waiver by the accused.'" 478 F.2d at 214. The Sieling court then went on to state,

> "We think Westbrook makes it plain that, where a defendant's competency has been put in issue, the trial court must look further than to the usual 'objective' criteria in determining the adequacy of a constitutional waiver. ... It was not suggested [in Westbrook], nor has it been in this case, that the state court's determination that the accused was competent to stand trial was incorrect. The clear implication, then, is that such a determination is inadequate because it does not measure the defendant's capacity by a high enough standard. While the Court did not suggest a standard, it is reasonable to conclude from the Court's language that the degree of competency required to waive a constitutional right is that degree which enables him to make decisions of very serious import." 478 F.2d at 214-15.

Following the Ninth Circuit's decision in Sieling, the Arizona Supreme Court decided State v. Decello, 111 Ariz. 46, 523 P.2d 74 (1974). The court analyzed both Westbrook and Sieling, and found them to be controlling. However, the court stated,

> "[T]he United States Supreme Court has indicated that greater care must be taken in allowing a person to waive his right to an attorney than it does in finding him competent to stand trial. Westbrook, supra. We do not believe, however, that the United States Supreme Court in Westbrook, supra, mandates that a defendant who is represented by counsel and is competent to stand trial must be given, absent other facts, a further hearing by the court as to his competency to waive his right to a jury." 111 Ariz. at 48-49, 523 P.2d at 76-77 (emphasis added.)

Subsequently, the court distinguished the Sieling holding,

> "We believe that the facts in the Sieling case may be distinguished from the facts in the instant case. In Sieling, supra, there was a definite conflict in the psychiatrists' testimony which not only put the defendant's sanity 'in issue', but raised a 'substantial question' as to his mental capacity. In the instant case, even though psychiatrists were appointed and the defendant was sent to the hospital for an evaluation, the reports were in agreement as to defendant's mental capacity." 111 Ariz. at 49, 523 P.2d at 77.

We cannot find that the three experts who testified at appellant's trial were in agreement as to his mental condition. It is clearly not sufficient that all found him competent to stand trial, Westbrook, supra, Sieling, supra. See also State v. Wagner, 114 Ariz. 459, 561 P.2d 1231 (1977).

The state urges that the record of the case reflects that appellant was competent to waive the jury. We decline to make such a finding. The questioning of appellant by the judge prior to the judge's acceptance of the waiver of the jury trial indicates that the appellant spoke no more than "Yes, sir," and "Yes, your Honor," in response to the questions posed by the court. The appellant did not testify at the trial. We do not believe we should presume the judge determined from this that appellant's level of competence rose to the higher standard mandated by Westbrook and Sieling absent a specific finding. Nor do we agree that the medication which contributed to the appearance of competence to stand trial necessarily proved a competence to

waive constitutional rights.

It is, however, not necessary to reverse the judgment of the court. We follow the analysis of our supreme court in Wagner, supra, that it is not necessary to reverse if the record can be expanded on remand to include a finding by the trial judge of the appellant's competence to waive a jury trial. In Wagner, our supreme court conceded that Pate v. Robinson, supra, held that no cure could be effected by a remand for an evidentiary hearing to determine the competency. Nevertheless, the court observed that the Sieling court had found that to be so because there had never been any competency determination, nor mental health examination, made in Pate. In Sieling, as well as in Wagner, and in the instant case, more than one mental health expert filed reports which were in the record from which the trial judge may be able to make a determination of the higher standard of competency required to waive the right, that is, the standard propounded by the Wagner court, "whether the defendant is making a rational and reasoned decision" on a

matter of very serious import.

We likewise follow the procedure of the supreme court in Wagner; the matter is remanded

> "to the trial court for a hearing to determine:
>
> 1. if the court did, in fact, find that the defendant was competent to [waive a jury trial], and
> 2. if this cannot be determined, if the defendant was, in fact, competent [to waive a jury trial].
>
> * * *
>
> The trial court shall conduct a hearing, make findings of fact and file same together with a reporter's transcript of the proceedings in this court within 90 days of the issuance of the mandate of this court in the instant case." 114 Ariz. at 463, 651 P.2d at 1235.

In the event that a finding of competency according to the announced standard is made, no further proceedings in the trial court need take place, and it is therefore necessary to consider appellant's other issues on appeal.

Appellant's primary argument is that the trial judge erred in applying the applicable statutory assignment of burden of proof of his insanity in rejecting his insanity defense. The

record indicates thaat there was extensive discussion between the court and the appellant's counsel concerning the applicable dates of two different statutes. A.R.S. Sec. 13-502 was amended by the 1983 legislature. The version before amendment said:

> "A person is not responsible for criminal conduct if at the time of such conduct the person was suffering from such a mental disease or defect as not to know the nature and quality of the act or, if such person did know, that such person did not know that what he was doing was wrong."

Our supreme court has held that a defendant could rebut the presumption of sanity by raising a reasonable doubt concerning his sanity. Once a reasonable doubt was raised, the burden of proof shifted to the state, which had to prove the defendant's sanity beyond a reasonable doubt. State v. Coconino County Superior Court, Division II, 139 Ariz. 422, 678 P.2d 1386 (1984), State v. Berndt, 138 Ariz. 41, 672 P.2d 1311 (1983).

The 1983 amendment raised the standard of the burden of proof the defendant must bear thusly:

"The defendant shall prove he is not

responsible for criminal conduct by reason of insanity by clear and convincing evidence." A.R.S. Sec. 13-502(B) (Supp. 1984).

Now, there is no shift in the burden of proof, rebutting of the presumption of sanity by clear and convincing evidence is required, and there is therefore no requirement of proof of sanity beyond a reasonable doubt. See State v. Coconino County, supra.

Appellant's main problem is that the above-quoted amendment became effective July 27, 1983, and the actions for which he is charged span a period of time from July 24 through August 3, 1983, with one count occurring July 27. Therefore, the burden as to his sanity shifted as to the dates of the different counts. State v. Coconino Co., supra. This information was conveyed to the trial judge, who indicated that he had studied the amendment and its effect, and that he had decided each count by the applicable standard. We believe the record demonstrates that this was done and there is evidence to support such findings.

Appellant cites as additional error a line of questioning concerning statements made to one of the psychiatrists by appellant concerning his knowledge of the offenses with which he was charged. Appellant had stated to Dr. Morenz that he was aware at the time of the interview with Morenz that what he had done was wrong. This statement was included in Dr. Morenz's Rule 11 examination report. Appellant's counsel moved in limine, prior to trial, to preclude admission into evidence of these remarks. No ruling was made on the motion because of the prosecutor's statement that he would not elicit the information in his examination.

On direct examination of Dr. Gurland, the other psychiatrist, appellant's counsel sought to have Dr. Gurland distinguish Dr. Mornez's examination which had not found insanity. On cross-examination, the state was apparently attempting to impeach Gurland's analysis of Mornez's diagnosis, and the cross-examination began:

"Q. Doctor, I think you indicated you were

familiar with a report done by Dr. Morenz?

A. Yes, I had a chance to review it earlier either some time last week or the beginning of this week.

Q. Then you are aware that of course when Mr. Cameron talked to Dr. Morenz that he indicated he knew that what he did was wrong?"

The appelllant's counsel's objection was overruled and the state was allowed to continue to inquire as to appellant's responses to Dr. Gurland and Dr. Morenz concerning his knowledge of the right- or wrong-ness of his actions.

This is the kind of evidence which Rule 11.7(b)(1), Rules of Criminal Procedure, 17 A.R.S., specifically excludes. Nor does the state assert that this testimony ought to have been allowed. We find that the objection was proper and that the question and the subsequent line of testimony were erroneously admitted. We find, though, that the error was harmless for more than one reason.

First, when the trial judge is also the trier of fact, the judge often hears otherwise inadmissible evidence. This is more often true

in civil trials, where juries are more frequently waived. Nevertheless, judges in criminal cases hear inadmissible evidence in suppression hearings and the like. Thus, our supreme court in State v. Garcia, 97 Ariz. 102, 397 P.2d 214 (1964) found harmless an error admitting evidence otherwise inadmissible when the criminal trial was to the judge, rather than to a jury.

Second, statements of the appellant to the psychiatrist were a part of the Rule 11 report of the doctor to the judge and were therefore already before the judge and were presumably already known to him.

And finally, we cannot say that evidence as to appellant's mental state at the time of the interview with the psychiatrist was so prejudicial as to confuse the judge. There was abundant testimony that persons undergoing a psychotic episode often recognize later the wrongness of what they did during the episode even though they are incapable of recognizing it at the time. Therefore, we find the error harmless and will not reverse. If it is found

that appellant was not competent to waive a jury trial, and further proceedings are mandated beyond that finding, we presume such error will not recur.

Appellant finally argues that the three consecutive ten-year sentences were excessive and that the judge failed to state his reasons for giving consecutive sentences. It is not necessary to restate the reason for giving consecutive sentences when the same reasons have adequately been given to explain why a sentence is aggravated. State v. Lamb, 142 Ariz. 463, 690 P.2d 764 (1984); State v. Bishop, 137 Ariz. 5, 667 P.2d 1331 (App. 1983). The trial judge adequately stated his reasons in the record for giving an aggravated sentence, i.e., the multitude of dangerous felony offenses committed, the use of deadly weapons and dangerous instruments, the infliction of serious physical injury upon one victim, and the threatened use of deadly physical force against a peace officer. It is not necessary for these reasons to be repeated to order consecutive sentences.

The trial court has broad discretion in sentencing. If a sentence is within statutory limits, it will not be modified or reduced unless, from the circumstances, it clearly appears that the sentence was an abuse of the trial court's discretion. State v. Stotts, 144 Ariz. 72, 695 P.2d 1110 (1985). While appellant's sentences were aggravated, they were not the top range of sentences available. Nor do we find any abuse of discretion in giving consecutive sentences. The sentences are affirmed.

Remanded for further proceedings consistent with this opinion. Upon filing of the record in this court of the further proceedings in the trial court, if the court has found the appellant was competent to waive the jury trial, the judgment of convictions and sentences will be affirmed by supplemental opinion. If no such finding is made, the judgment will be reversed.

HOWARD and FERNANDEZ, JJ., concur.

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. LAWRENCE ALLEN CAMERON, Appellant,	)	2 CA-CR 3446, 2 CA-CR 3447-2, 2 CA-CR 4192-3 and 2 CA-CR 4193-4, Consolidated DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Causes Nos. CR-11439 and CR-11440

AFFIRMED

Hon. Thomas Meehan, Judge

Robert K. Corbin, The Attorney General
by William J. Schafer III and Greg A. McCarthy Phoenix

Attorneys for Appellee

Frederic J. Dardis, Pima County Public Defender
by Frank P. Ieto Tucson

Attorneys for Appellant

Appendix 2

B I R D S A L L , Judge

When this case was before us the first time on appeal we remanded for the trial court to determine, after a hearing, if the court did, in fact, find that the defendant was competent to waive a jury trial; or if that could not be determined, if the defendant was competent to waive a jury trial;. State v. Cameron, 146 Ariz. 210, 704 P.2d 1355 (App. 1985).

The hearing directed by this court was held and the trial court found that the defendant was, in fact, competent to waive a jury trial, as he did. This appeal is from that finding. In Cameron I we held that if the trial court found the appellant competent to waive the jury trial, the convictions and sentences would be affirmed.

The appellant now contends that he was denied due process in the proceedings on remand because the trial court refused to appoint mental health experts to conduct new examinations and report their opinions as to appellant's competence to waive the jury trial in 1983. The trial court

believed the prior evaluations and testimony of two psychiatrists and a psychologist, the prior record which we discussed in Cameron I, and the new hearing were sufficient. Except for requesting the new appointments and examinations, the appellant offered no other evidence. We do not believe due process required the court to appoint new experts or to have an evidentiary hearing. Whether the prior record was sufficient was a matter within the discretion of the trial court and we find no abuse.

The appellant next contends the trial court used the wrong standard to make its determination. We disagree. Although the trial judge did make some imprudent statements when asked directly if he was applying the standard we recognized in Cameron I, the judge replied "obviously." We must accept that answer.

Finally, the appellant questions the sufficiency of the evidence. No direct evidence showed appellant's competency to waive the jury. And none of the three experts were asked their opinion on this question. Nevertheless, there

was extensive evidence of the appellant's mental health. Absent an examination for the specific purpose of competency to waive a jury, this evidence was as much or more than that usually presented. We believe it was more than sufficient.

Affirmed.

"/s/ Ben C. Birdsall"
BEN C. BIRDSALL, Judge

CONCURRING:

"/s/ Joseph M. Livermore"
JOSEPH M. LIVERMORE, Presiding Judge

"/s/ Michael A. Lacagnina"
MICHAEL A. LACAGNINA, Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

LAWRENCE ALLEN CAMERON, Petitioner, vs. ROBERT GOLDSMITH and ROBERT CORBIN, Respondents.	)	NO. CIV-88-250-TUC-ACM(RTT) ORDER

This prisoner petition, pursuant to consent, was referred to the United States Magistrate for all proceedings and the entry of judgment in accordance with 28 U.S.C. Sec. 636(c). Petitioner, represented by counsel, filed a petition for writ of habeas corpus. The Attorney General of the State of Arizona has responded to the petition and has requested that the petition be denied. Additional pleadings have been filed and pursuiant to the order of July 11, 1988, this matter is deemed submitted for determination.

The issue before the court is whether petitioner's custody violates the Constitution or

laws or treaties of the United States.

Petitioner, after a court trial, was convicted of the following: Aggravated assault, four counts; third degree burglary, one count; kidnapping, one count; attempted first degree burgalry, one count; resisting arrest, one count; theft, one count; criminal damage, one count. The trial court found that aggravated circumstances existed and effectively sentenced petitioner to three consecutive ten year sentences of imprisonment (Exhibit 2, pleading no. 8, 46-52).

Petitioner appealed his convictions and sentences to the Arizona Court of Appeals. On May 1, 1985, the appellate court in State v. Cameron, 146 Ariz. 210, 704 P.2d 1355 (App. 1985), remanded the case for a determination of petitioner's competency to waive a jury trial.

A hearing on remand was held on October 18, 1985, and the trial court found that petitioner, at the time of the waiver of the jury trial, was competent to waive the jury trial. (Exhibit, pleading no. 9). Petitioner again appealed his convictions and sentences. The convictions and

sentences were affirmed on June 11, 1986, in a memorandum decision (Exhibit 12, pleading no. 8).

Petitioner filed a petition for review. The Arizona Supreme Court denied review on October 8, 1986 (Exhibit 14, pleading no. 8).

The Arizona Court of appeals [sic] summarized the proceedings in the original trial, in part, at 146 Ariz. 211, as follows:

> Following a Rule 11 examination to determine his competency, appellant was found competent to stand trial * * *. Appellant waived his right to a jury trial and raised an insanity defense. He was found guilty on all counts * * *.
>
> * * * *
>
> Following the determination of appellant's competency to stand trial, the parties agreed to waive a jury trial, and at a hearing, following questioning of appellant by the trial judge, the judge approved of the waiver of the jury. The defense of insanity had been raised and much of the actual trial consisted of testimony as to appellant's

sanity at the time of the incidents. * * *

It appears that petitioner has exhausted his state court remedies. The claims petitioner asserts in the instant petition for writ of habeas corpus have been presented to the state courts. Petitioner asserts, generally, the following three grounds for habeas corpus relief: (1) The state appellate court improperly remanded the case for a determination of his competency to waive a jury trial. Petitioner asserts that the case should have been reversed. (2) The trial court improperly conducted the hearing on remand. Petitioner asserts the trial court failed to hold an evidentiary hearing and applied an incorrect legal standard. (3) The trial court, during the trial, improperly admitted evidence. This evidence was a statement made by petitioner to a psychiatrist.

The Arizona Court of Appeals considered the issue of the statement to the psychiatrist and determined that its admission was harmless error. The court stated, in part, at 146 Ariz. 215, as follows:

First, when the trial judge is also the trier of fact, the judge often hears otherwise inadmissible evidence. * * * [O]ur supreme court [omitting citation] found harmless error admitting evidence otherwise inadmissible when the criminal trial was to the judge, rather than to a jury. [Omitting footnote]

Second, the statements of the appellant to the psychiatrist were a part of the Rule 11 report of the doctor to the judge and were therefore already before the judge and were presumably already known to him.

And finally, we cannot say that evidence as to the appellant's mental state at the time of the interview with the psychiatrist was so prejudicial as to confuse the judge. * * * [W]e find the error harmless and will not reverse. * * *

The Supreme Court in Rose v. Clark, ___ U.S. ___, 92 L.Ed.2d 460 (1986), reiterated the harmless error standard of Chapman. The Court stated at 471, in part, as follows:

We have emphasized, however, that while there are some errors to which Chapman does not apply, they are the exception and not the rule. [Omitting citation] Accordingly, if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis. The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed. As we have repeatedly stated, 'the Constitution entitles a criminal defendant to a fair trial, not a perfect one.' [Omitting citations].

The United States Supreme Court discussed the harmless error rule in United States v. Hastings, 461 U.S. 499, 76 L.Ed.2d 96 (1983). The court

stated, in part, at 76 L.Ed.2d 106, as follows:

> In holding that the harmless-error rule governs even constitutional violations under some circumstances, the Court recognized that, given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial. [Omitting citations and footnotes]

It appears that any error in petitioner's trial would have been harmless. The record, developed at trial, establishes petitioner's guilt beyond a reasonable doubt.

Petitioner contends that the remanding of his case by the Arizona Court of Appeals violated his due process rights. The reason for the remand was clearly stated by the Arizona Court of Appeals. The court stated, in part, at 146 Ariz. 213, as follows:

> It is, however, not necessary to reverse the judgment of the court. We follow the

analysis of our supreme court in Wagner, supra, that it is not necessary to reverse if the record can be expanded on remand to include a finding by the trial judge of the appellant's competence to waive a jury trial.

* * *

* * *

In the event that a finding of competency according to the announced standard is made, no further proceedings in the trial court need take place, and it is therefore necessary to consider appellant's other issues on appeal.

The announced standard was: "'[W]hether the defendant is making a rational and reasoned decision' on a matter of very serious import." 146 Ariz. at 213.

The Ninth Circuit in Seiling v. Eyman, [sic] 478 F.2d 211 (9th Cir., 1973), remanded the case so that the state trial court could make a determination whether a habeas corpus petitioner had been competent to plead guilty. The court stated, in part, at 216, as follows:

> [W]e conclude that the trial court should have an opportunity to review the psychiatric evidence in light of our opinion, to decide in the first instance, whether there is sufficient evidence upon which to make that determination.

Seiling, [sic] supra was a case from Arizona. The facts in this case are similar to the instant case. Sanity was an issue in Seiling [sic] and he was examined by psychiatrists, a hearing was held, and the psychiatrists testified. The court found that Seiling [sic] was competent to stand trial. Seiling [sic] then entered into a plea agreement, but the trial court never made a finding that Seiling [sic] was competent to enter a plea. The state courts affirmed his conviction and the district court dismissed the petition for writ of habeas corpus.

On October 18, 1985, the trial court, in the instant case, held a hearing on petitioner's competency to waive a jury trial. A transcript of this hearing is attached to pleading no. 9. The trial court stated, in part, as follows:

Show that the Court has reviewed the record and has reviewed the medical reports and the Court finds that the defendant at the time of the waiver of trial by jury was competent to make an intelligent and voluntary waiver of trial by jury and did so. (Tr. 4).

It should be noted that the trial judge presided over the hearing to determine petitioner's competency to stand trial. The judge also presided at the trial where the defense was insanity and psychiatric testimony was presented. The trial court, at the commencement of the trial, explained petitioner's rights to a jury trial and questioned petitioner as to petitioner's decision to waive a jury trial (Exhibit 1, pleading no. 8, 18-24).

Petitioner contends that the state trial court applied an incorrect legal standard at the hearing on remand. The opinion of the court of appeals, State v. Cameron, supra directed the trial court as to the legal standard. The trial court, at the conclusion of the hearing on remand

responded that "obviously" the court's findings were based on the standard as stated by the court of appeals (Pleading no. 9, page 5).

The state trial court found that plaintiff was competent to waive a jury trial. The state appellate courts have ruled against petitioner's claims. The opinion of the Arizona Court of Appeals concluded that if the trial court found Cameron was competent to waive a jury trial his convictions and sentences would be affirmed by a supplemental opinion. Cameron's convictions were subsequently affirmed and the Arizona Supreme Court denied review.

28 U.S.C. Sec. 2254(d), provides, in part, as follows:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the

State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit . . . .

The United States Supreme Court in Sumner v. Mata 499 U.S. 539 (1981), stated at page 547: "This interest in federalism recognized by Congress in enacting Sec. 2254(d) requires deference by federal courts to factual determinations of all state courts."

In Sumner v. Mata, 455 U.S. 591 (1982), the Supreme Court stated, in part, at pages 592-593:

Only when one of seven specified factors is present or the federal court determines that the state-court finding of fact 'is not fairly supported by the record' may the presumption properly be viewed as inapplicable or rebutted.

We held further that the presumption of correctness is equally applicable when a

state appellate court, as opposed to a state trial court, makes the finding of fact, and we held that if a federal court concludes that the presumption of correctness does not control, it must provide a written explanation of the reasoning that led it to conclude that one or more of the first seven factors listed in Sec. 2254(d) were present, or the 'reasoning which led it to conclude that the state finding was not fairly supported by the record.'

The court went on to say, in part, at pages 597-598:

But the statute does require the federal courts to face up to any disagreement as to the facts and to defer to the state court unless one of the factors listed in Sec. 2254(d) is found. Although the distinction between law and fact is not always easily drawn, we deal here with a statute that requires the federal courts to show a high measure of deference to the factfindings made by the state courts.

A review of the record fails to establish, as required by 28 U.S.C. Sec. 2254(d), any of the following: (1) that the merits were not resolved in the state court hearing; (2) that the fact finding procedure was not adequate to afford a full and fair hearing; (3) that the material facts were not adequately developed; (4) that the state court lacked jurisdiction; (5) that petitioner was not represented by counsel; (6) that petitioner did not receive a full, fair, and adequate hearing; (7) that petitioner was otherwise denied due process of law; (8) that the factual determination is not fairly supported by the record.

Petitioner's Constitutional rights were not violated in the state courts. Petitioner received a fair hearing and was afforded due process of law. Any error relating to the statement of the psychiatrist was clearly harmless. The record establishes petitioner's guilt beyond a reasonable doubt. The state court found petitioner competent to stand trial, competent to waive a jury trial, and rejected

petitioner's insanity defense.

The language of Chief Justice Burger in Morris v. Slappy, 461 U.S. 1 (1983), is appropriate in petitioner's case. Chief Justice Burger stated, in part, at page 15 as follows:

> Over 75 years ago, Roscoe Pound condemned the American courts for ignoring 'substantive law and justice,' and treating trials as sporting contests in which the 'inquiry is, Have the rules of the game been carried out strictly?' [Omitting citations] A criminal trial is not a 'game,' and nothing in the record of respondent's two trials gives any support for the conclusion that he was constitutionally entitled to a new trial. The state courts provided respondent a fair trial, and the United States District Judge properly denied relief.

IT IS ORDERED that the petition for writ of habeas corpus is dismissed.

The Clerk is directed to enter judgment dismissing the petition for writ of habeas corpus. The Clerk is further directed to mail

copies of this order to petitioner and to the attorney for the respondents.

Dated this 1 day of December, 1988.

*/s/ Raymond T. Terlizzi

UNITED STATES MAGISTRATE

Not for Publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE ALLEN CAMERON, Petitioner - Appellant, v. ROBERT K. CORBIN, Attorney General, Respondent - Appellee.	No. 88-15837 D.C. No. CV-88-0250-ACM MEMORANDUM *

Appeal from the United States District Court
for the District of Arizona
Alfredo C. Marquez, District Judge, Presiding

Argued and Submitted August 17, 1989
San Francisco, California

Before: WIGGINS, and KOZINSKI, Circuit Judges, and BYRNE, District Judge. **

An Arizona trial court convicted Cameron of

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** Hon. Wm. Matthew Byrne, Jr., Central District of California, sitting by designation.

various counts of assault, burglary, kidnapping, theft, criminal damage and resisting arrest. After exhausting his state remedies, Cameron petitioned the district court for a writ of habeas corpus, alleging constitutional error in his state court proceedings.

The Arizona Court of Appeals found error in the failure of the state trial court to determine Cameron's competency to waive a jury trial, and remanded the case to the trial court for a competency determination. State v Cameron, 146 Ariz. 210, 704 P.2d 1355, 1358 (Ariz.App. 1985). The decision to remand for a competency hearing rather than to reverse the conviction was proper: there was an adequate record, containing psychiatric evidence as to petitioner's mental state at the time of the waiver, from which the trial court could make a nunc pro tunc competency determination. See Sieling v Eyman, 478 F.2d 211, 215-16 (9th Cir. 1973); Evans v Raines, 705 F.2d 1479, 1481 (9th Cir. 1983).

On remand, the trial court held a competency hearing and determined that Cameron had been

competent to waive a jury trial. The Arizona Court of Appeals affirmed. State v Cameron, CR-11439, CR-11440 (Ariz.App. June 11, 1986). The trial court made its determination after a review of the trial record and contemporaneous psychiatric reports. The court stated that its decision was based on the standard set forth by the Arizona Court of Appeals. That standard was correct. On these facts, we conclude that Cameron was afforded a constitutionally adequate determination of his competency to stand trial. The determination was fairly supported by the record. See 28 USC Sec. 2254(d); Maggio v Fulford, 462 U.S. 111, 117 (1983); Evans v Raines, 800 F.2d 884, 887-88 (9th Cir. 1986).

Cameron also claims that the admission at trial of certain statements he made to a psychiatrist violated his constitutional right against self incrimination. On review of the record developed at trial, we conclude that if the statements were admitted in error, the error was harmless beyond a reasonable doubt. See Chapman v California, 386 U.S. 18, 24 (1967).

AFFIRMED.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA, Plaintiff, vs. LAWRENCE ALLEN CAMERON, Defendant.	)	NO. CR-11439 & CR-11440

Tucson, Arizona

October 18, 1985

BEFORE: The Hon. G. Thomas Meehan, Judge

APPEARANCES:

Kenneth Peasley
appearing for the State;

Michael Mussman,
appearing for the Defendant.

TRANSCRIPT OF PROCEEDINGS

Don L. Gautier, RPR, CM
Official Court Reporter
Pima County Superior Court
Tucson, Arizona 85701

Appendix 5

THE COURT: State of Arizona versus Lawrence Allen Cameron, CR-11439, CR-11440, Mike Mussman and Ken Peasley.

Mike, you know, in reading everybody's memorandum and then rereading that Court of Appeals' caase, I don't know of any reason why I can't make a determination based on the Rule Eleven proceeding that was held, on the transcript of the proceeding that was held just prior to trial when I went through the waiver of trial by jury and make a finding on his competency based on that.

MR. MUSSMAN: Well, Judge, I think the reason that you can't do that is the Rule Eleven proceeding just concerned his competency to stand trial.

THE COURT: I understand that.

MR. MUSSMAN: No issue was ever raised as to his competency to waive a jury trial.

THE COURT: I don't know of any

different standard other than the competence. I don't think he has to have a higher standard to waive a trial by jury than competent to stand trial.

MR. MUSSMAN: Well, my reading of the Court of Appeals' opinion is that there is in fact a higher standard to waive a jury than there is to stand trial. That's why the remand issue.

MR. PEASLEY: Judge, I would agree that there is a somewhat different standard and I think in the opinion the Court made it clear that you could go back.

You had a lot available to you, if you could make the finding from what was available to you.

THE COURT: See, I don't remember anything, Mike, that indicated that Mr. Cameron didn't know what he was doing. And, you know, you represented him and were advising him at all times and you never indicated or in any way -- I'm not saying you should because you would have if you thought he wasn't -- you know, that he wasn't competent.

As I recollect in my review of the thing was he absolutely understood what he was doing. He may not have liked the result once it was over but there is nothing that I recall or having read that would indicate that he was not other than competent to waive trial by jury.

MR. MUSSMAN: Well, Judge, I think the Court of Appeals was asked to do what Mr. Peasley's asking you, just to look at the record and find that the record reflects he was competent.

The Court of Appeals says there is nothing in the record that really shows that. All it shows is yes, sir.

THE COURT: Show that the Court has reviewed the record and has reviewed the medical reports and the Court finds that the defendant at the time of the waiver of trial by jury was competent to make an intelligent and voluntaty waiver of trial by jury and did so.

THE DEFENDANT: Yur honor, if I could say something in my own defense, please. Could I approach the Court?? [sic]

THE COURT: You can say whatever. I don't care what you say.

Your lawyer's standing here. He may not like it.

THE DEFENDANT: What you're saying is you found no reason that I wouldn't be competent at the time to stand for trial or know what I was saying.

But I would like the record to reflect that I was brought here directly from Kino Hospital and under a lot of psychiatric medication at the time and I don't even recall being here and waiving my right to any trial.

THE COURT: All right.

Don't let Bill Lane get away. Will you, Don?

Is there anything else you want to put on the record, Mr. Cameron?

THE DEFENDANT: That's about it.

THE COURT: Okay.

MR. PEASLEY: Judge, I assume that the Court's findings are also based upon the standard that was set forth in the appellate decision that

reviewed the case.

THE COURT: Obviously.

MR. PEASLEY: Okay.

MR. MUSSMAN: I have nothing further.

Thank you, Your Honor.

* * * * *